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No. 85-591

In the Supreme Court of the United States

OCTOBER TERM, 1985

W.C. GARCIA & ASSOCIATES, INC., PETITIONER

v.

MICHAEL D. SASSI, DISTRICT DIRECTOR,
INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in this action for an injunction against collection of federal taxes, the court of appeals correctly dismissed petitioner's appeal as moot where petitioner neglected to obtain a stay pending appeal, but instead paid, at the conclusion of the district court proceedings, the entire amount of the taxes due.

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OPINIONS BELOW

The orders of the court of appeals (Pet. App. 1a, 3a) and of the district court (Pet. App. 2a, 4a-7a) are unreported.

JURISDICTION

The order of the court of appeals dismissing the appeal as moot (Pet. App. 1a) was entered on February 11, 1985. A timely petition for rehearing was denied on July 11, 1985 (Pet. App. 3a). The petition for a writ of certiorari was filed on October 4, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a California corporation. During an audit of its 1975 corporate income tax return, petitioner agreed that it was a "personal holding company" within the

meaning of Section 541 of the Internal Revenue Code.[1] On March 8, 1978, petitioner's president signed IRS Form 2198, "Determination of Liability of Personal Holding Company (PHC) Tax." In signing that Form, petitioner agreed that its PHC tax liability for 1975 was $82,833.80 (CR 11, Exh. A; CR 21, Exhs. C & D).[2]

On the same day, petitioner's president signed IRS Form 870-C, "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax." In signing that Form, petitioner consented to the immediate assessment of the above-mentioned taxes and explicitly waived the right to contest its liability therefor in the Tax Court.[3] Petitioner's consent to assessment as thus expressed was to take effect 120 days after the IRS approved petitioner's Form 2198, which, as noted above, concerned the amount of its 1975 PHC tax liability. The IRS approved petitioner's Form 2198 one week later, on March 15, 1985 (CR 11, Exh. A; CR 21, Exhs. C & D).

It was understood and agreed by the parties that petitioner was entitled to pay a so-called "deficiency dividend" under Section 547 of the Code—in essence, to "purge" itself of the income that caused it to be a personal holding company—and thus to eliminate (retroactively as it were) its liability for PHC tax. The statute requires that such a

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[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended and in effect for the period in issue (the Code or I.R.C.).

[2]"CR" refers to the docket control number assigned to the documents in the original record by the clerk of the district court.

[3]The Form 870-C signed by petitioner's president stated as follows (CR 11, Exh. A):

> I understand that by my signing this waiver, the corporation will not be able to contest these years in the United States Tax Court, unless additional deficiencies are determined for these years.

deficiency dividend be paid "within 90 days after the determination" of the taxpayer's PHC tax liability (I.R.C. § 547(d)(1)). The statute further requires that the taxpayer file a "Claim for a Deficiency Distribution Deduction," on IRS Form 969, "within 120 days after the determination" of said liability (I.R.C. § 547(e)). Since the "determination" of petitioner's 1975 PHC tax liability was effected by the IRS's acceptance of petitioner's Form 2198 on March 15, 1978, petitioner was required by the statute to file its claim on Form 969 by July 13, 1978.

Although petitioner eventually paid a deficiency dividend to its shareholders, it failed to file a claim on Form 969 within the 120-day period that the statute prescribes. On July 13, 1978, therefore, petitioner's consent to the assessment of its 1975 PHC taxes became effective. The IRS assessed those taxes in due course, based on the waiver of restrictions on assessment and collection previously signed by petitioner's president. Petitioner thereafter submitted an untimely claim on Form 969, which was denied by the IRS as unauthorized by the statute (CR 21).

2. Petitioner then brought this suit against respondent Sassi, the IRS District Director, in the United States District Court for the Northern District of California, seeking to enjoin collection of the tax. Petitioner alleged that the assessment of PHC taxes was invalid because the IRS had failed to send it a "notice of deficiency" as required by Sections 6212 and 6213 of the Code. Section 6213(a) sets forth a "restriction on assessment" of taxes, providing generally that the IRS may not assess or collect a tax without first sending the taxpayer a notice of deficiency under Section 6212. Section 6213(d), however, provides that "[t]he taxpayer shall at any time * * * have the right, by a signed notice in writing * * *, to waive the restrictions provided in [Section 6213](a) on the assessment and collection" of the

tax. The IRS responded to petitioner's allegations by pointing out that, on March 8, 1978, petitioner's president had signed IRS Form 870-C waiving the Section 6213(a) restrictions and consenting to assessment of its 1975 PHC tax deficiency, so that a "notice of deficiency" was not required.

Following a hearing, the district court denied petitioner's application for a temporary restraining order, finding that there existed substantial questions about the probability of petitioner's success on the merits and that petitioner had not shown inability to pay the tax and sue for a refund (Pet. App. 4a). Following a second hearing, the court denied petitioner's motion for a preliminary injunction (*id.* at 5a-7a). It rejected petitioner's argument that it was entitled to injunctive relief merely by alleging an improper assessment, holding that petitioner also had to show irreparable harm and the absence of an adequate remedy at law, which petitioner had not done. See *Cool Fuel, Inc.* v. *Connett,* 685 F.2d 309, 313 (9th Cir. 1982); *Perlowin* v. *Sassi,* 711 F.2d 910, 912 (9th Cir. 1983); *Philadelphia & Reading Corp.* v. *Beck,* 676 F.2d 1159, 1163 (7th Cir. 1982). The district court thereafter granted the government's motion for summary judgment, which was based on petitioner's failure to show irreparable injury and lack of an adequate legal remedy, and dismissed the complaint with prejudice (Pet. App. 2a). Petitioner neglected to obtain a stay of the trial court's orders, but instead, on May 30, 1984, sent a check to the IRS in the amount of $137,763.31. That check represented the unpaid balance due on its assessed tax liability plus applicable penalties and interest (Pet. 5-6).

After petitioner filed a notice of appeal, the government moved to dismiss the appeal as moot or in the alternative for summary affirmance. The court of appeals by unpublished order granted the motion to dismiss (Pet. App. 1a). It stated that petitioner's "satisfaction of the assessed tax

deficiency constituted payment of the taxes" and that petitioner's "appeal from the dismissal of its action for an injunction against the collection of [the] taxes * * * is therefore moot" (*ibid.*).

ARGUMENT

1. The decision below is correct. Under Article III of the Constitution, the judicial power of the United States extends only to "cases" and "controversies." It is the duty of federal courts "to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions." *Mills* v. *Green,* 159 U.S. 651, 653 (1895). The "actual controversy" that is required must be in existence at all stages of review, and not merely at the time the complaint is filed. *Preiser* v. *Newkirk,* 422 U.S. 395, 401 (1975); *Steffel* v. *Thompson,* 415 U.S. 452, 459 n.10 (1974). Therefore, a case that was "live" when the complaint was filed may become moot on appeal. *DeFunis* v. *Odegaard,* 416 U.S. 312, 316 (1974).

The court of appeals properly dismissed petitioner's appeal as moot. Petitioner sought an injunction against the collection of federal taxes. See I.R.C. § 7421(a) (cross-referring to I.R.C. § 6213(a) (last sentence)). When that injunction was denied, petitioner chose to pay the entire amount of the assessed tax without seeking a stay pending appeal. Fed. R. Civ. P. 62; Fed. R. App. P. 8(a). Because the taxes had been paid in full, the court of appeals was without jurisdiction to order that their collection be enjoined. There was thus no longer any case or controversy between the parties. *Little* v. *Bowers,* 134 U.S. 547 (1890); *Singer Manufacturing Co.* v. *Wright,* 141 U.S. 696 (1891); *Koger* v. *United States,* 755 F.2d 1094, 1096 (4th Cir. 1985); *Hall* v. *United States,* 749 F.2d 373 (7th Cir. 1984).

2. Petitioner asserts (Pet 11) that its appeal was not moot because its $137,763.31 remittance made on May 30, 1984, was not a "payment" of tax but was a mere "deposit"

in the nature of a cash bond. This assertion is meritless. The courts, of course, have distinguished between payments made to satisfy an assessed tax liability and advance payments in the nature of a cash bond made to avoid the accumulation of interest. The IRS will treat as a cash bond, and place in a "suspense account," any remittance accompanied by a clear statement that it is intended solely to avoid the accumulation of interest and penalties with respect to an anticipated assessment. See *Rosenman* v. *United States,* 323 U.S. 658 (1945); *Fortugno* v. *Commissioner,* 353 F.2d 429, 435 (3d Cir. 1965), cert. dismissed, 385 U.S. 954 (1966). The IRS will return such a deposit at the taxpayer's request at any time before an assessment of the subject taxes is made. However, upon assessment, the deposit is treated as a payment and applied against the assessed tax liability. See Rev. Proc. 82-51, 1982-2 C.B. 839, 840 (where a taxpayer upon completion of an audit "execute[s] a waiver of restrictions on assessment and collection of the deficiency or otherwise agrees to the full amount of the deficiency, an assessment will be made and any deposit [will be] applied against the assessed liability. In such a case, no notice of deficiency will be mailed.").

Petitioner's attempt (Pet. 11) to characterize its remittance as a mere "deposit in the nature of a cash bond" has no basis in the record. Petitioner signed IRS Form 870-C on March 8, 1978, consenting to the assessment and collection of its PHC taxes and further waiving its right to contest those deficiencies in the Tax Court. That consent became effective on July 13, 1978, when petitioner failed to file IRS Form 969 within the 120-day period specified by the statute. See I.R.C. § 547(e). The IRS subsequently assessed the deficiency in accordance with the conditions to which petitioner had previously agreed. Since petitioner's tax liability had already been assessed at the time it made its $137,633

remittance, that remittance necessarily constituted a payment of taxes and could not be a "cash bond." Rev. Proc. 82-51, *supra*, at 840.

3. Contrary to petitioner's assertion (Pet. 10-11), the decision below does not conflict with *Rosenman* v. *United States*, 323 U.S. 658 (1945), which the court of appeals (Pet. App. 1a) correctly cited in support of its holding. In *Rosenman*, an estate had delivered a check to the IRS in 1934 on account of estate taxes expected to be assessed; the check was delivered the day before the estate tax was due, "solely for the purpose of avoiding penalties and interest" (323 U.S. at 659-660). The IRS deposited the check to the estate's credit in a "suspense account [which] concern[ed] moneys received in connection with federal estate taxes [as to which] no assessment [was] outstanding at the time" (*id.* at 660). The IRS ultimately assessed the estate tax in April 1938, some three and a half years after receiving the check (*id.* at 661).

This Court held that the estate's delivery of the check to the IRS in 1934 did not constitute "payment of [the estate] tax" (323 U.S. at 659). Rather, the estate tax could not be "paid" prior to "the assessment of a deficiency by the Commissioner in April 1938," whereupon "payment was then made by the application of the balance credited to the [estate] in the suspense account" against the tax so assessed (*id.* at 661-662). The 1934 check, the Court said, was held by the IRS "but as a deposit made in the nature of a cash bond for the payment of taxes thereafter found to be due" (*id.* at 662).

The decision below is completely consistent with *Rosenman*. There, the remittance deemed a "cash bond" was made three and a half years before the assessment; the Court concluded that the remittance became a "payment" upon the assessment, when the deposit was applied against the taxes so assessed. Here, as petitioner concedes (Pet. 5),

the remittance was made almost five years *after* the assessment, and it thus became a "payment" immediately. Although petitioner's remittance was accompanied by a letter styling the payment "a deposit in the nature of a cash bond" (Pet. 6), the label petitioner attached is irrelevant in view of the fact that the assessment had long ago been made. Whatever petitioner called the remittance, it became a "payment" when it was applied against the existing assessed liability. See *Rosenman,* 323 U.S. at 661; Rev. Proc. 82-51, *supra,* at 840. The law is clear that remittances made in such circumstances are to be treated as tax payments and not as mere deposits. See, *e.g., Charles Leich & Co.* v. *United States,* 329 F.2d 649 (Ct. Cl. 1964); *Republic Petroleum Corp.* v. *United States,* 613 F.2d 518, 526 (5th Cir. 1980).[4]

Petitioner's assertion that it tendered the remittance only "to prevent [the IRS] from seizing [its] assets" (Pet. 6) is also irrelevant in determining whether the remittance was a payment or a cash bond. As we have shown above, the remittance was necessarily a "payment" because, given the existence of the outstanding assessment, the remittance discharged petitioner's tax liability. If petitioner wished to prevent collection of the tax pending appeal of the district court's denial of a preliminary injunction, petitioner's proper remedy was to request a stay pending appeal. Fed.

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[4]Petitioner seems to acknowledge that *Rosenman* stands for the principle "that a remittance made prior to assessment d[oes] not constitute payment of the tax" (Pet. 9), but seeks to bring itself within that principle by asserting that "there has been no *valid* assessment of the tax" here (*id.* at 9, 11 (emphasis added)). But that assertion begs the question, for it is the validity of the assessment that petitioner seeks to challenge on the merits. The taxpayer in *Rosenman* similarly complained on the merits of an "alleged illegal assessment" (323 U.S. at 661), but that allegation did not stop the assessment from converting its deposit into a "payment" for purposes of ascertaining jurisdiction. It is the *fact,* not the *validity,* of the assessment that determines the status of petitioner's remittance as a "payment" rather than a "cash bond."

R. App. P. 8(a). See *Little* v. *Bowers,* 134 U.S. at 552-553; *Koger* v. *United States,* 755 F.2d at 1098. Petitioner failed to do that, and instead elected to discharge its existing tax liability. The taxes having thus been collected in full, petitioner's action to enjoin their collection became moot. It is well settled that payment of a tax followed by a suit for refund constitutes an adequate remedy at law. *Bob Jones University* v. *Simon,* 416 U.S. 725, 742 (1974); *South Carolina* v. *Regan,* 465 U.S. 367, 374-376 (1984). Petitioner's proper avenue of redress at this point is accordingly to file a claim for refund of the taxes it has paid, and, if a refund is refused, to raise its allegations concerning the supposed invalidity of the assessment in a suit for refund brought in a district court or in the Claims Court. See 28 U.S.C. 1346(a)(1).

CONCLUSION

The petition for a writ of certiorari should be denied.[5]

Respectfully submitted.

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[5]Because of its ruling on the mootness issue, the court of appeals had no occasion to address the merits of petitioner's claim that it was entitled to injunctive relief under Section 6213(a) because of the supposed invalidity of the assessment. As petitioner seems to recognize (Pet. 16), the injunction issue is not before this Court. We accordingly have not responded to petitioner's contentions on the merits, but will do so if the Court requests.